Supreme Court
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NO. 96-1494

IN THE

Supreme Court of the United States

October Term, 1997

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX

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8 pp

LIST OF PARTIES

United States of America, Plaintiff.

Alcan Aluminum Corp.; BASF Corp.; Beazer Materials and Services, Inc.; Borg-Warner Corp.; Carrier Corp.; Chemical Leaman Tank Lines, Inc.; Chemical Management, Inc.; Chrysler Motors Corp., Dana Corp., Dart Industries, Inc.; Exxon Corp.; Ford Motor Company; Goulds Pumps, Inc.; Hitchcock Gas Engine Company, Ingersoll-Rand; NEAPCO, Inc.; Rome Strip Steel Co., Inc.; Stanley Works, Inc.; TRW, Inc.; United Technologies, Defendants.

SUPPLEMENTAL APPENDIX

Attached hereto as a Supplemental Appendix to the Petition for Writ of *Certiorari* of Petitioner Alcan Aluminum Corporation is *United States v. Alcan Aluminum Corp.*, Memorandum Opinion and Order dated October 4, 1995. This Memorandum Opinion and Order was inadvertently omitted from Petitioner's Petition for Writ of Certiorari and erroneously referred to in Opinions Below as printed at A-103.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	CIVIL ACTION
Plaintiff,	:	NO. 89-1657
	:	
vs.	:	(J. VANASKIE)
	:	
ALCAN ALUMINUM CORPORATION,	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

In reversing and remanding this Court's determination that Alcan Aluminum Corp. ("Alcan") was jointly and severally liable for the costs of remediating a release of hazardous substances into the Susquehanna River, our Court of Appeals indicated that if Alcan could establish that its used "emulsion did not or could not, *when mixed with other hazardous wastes*, contribute to the release [of hazardous substances into the Susquehanna River] and the resultant response costs, then Alcan should not be responsible for any response costs [incurred by the United States under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 U.S.C. 9601, *et seq.*]" (Emphasis in original.) *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 270 (3d Cir. 1992). Alcan had the burden of proving that its emulsion did not contribute to the pollution of the Susquehanna River or that there was a factual basis for the apportionment among

responsible parties of the costs incurred to remediate the Site.[1]

On remand, Alcan did not present any evidence relating to the "intensely factual" matters of relative toxicity, migratory potential or synergistic capacity of its emulsion when mixed with other hazardous substances at issue, nor did Alcan attempt to demonstrate the volume of waste disposed of at the Site or the percentage of that volume represented by Alcan's wastes. Instead, both Alcan and the United States moved for summary judgment, essentially relying on the record that had formed the predicate for the initial summary judgment ruling in this case and the Court of Appeals' decision referenced above. Because Alcan had failed to present an evidentiary basis for its contention that its used emulsion was not part of the chemical soup that was removed from the Susquehanna River and did not otherwise pursue a request for apportionment of damages on some volumetric or other basis, Alcan was held jointly and severally liable for the costs incurred by the United States in cleaning up the polluted Susquehanna River. (Memorandum and Order dated June 28, 1995 (Dkt. Entry 161).)

On July 13, 1995, Alcan filed a motion for reconsideration of the decision granting summary judgment in favor of the United States. (Dkt. Entry 163.) To warrant consideration, the movant must show that there is some clear error of law or evident misapplication of the facts. *Harso Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986). Because Alcan has not shown clear

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[1]The Site was a network of coal mines and related tunnels, caverns, pools and waterways bordering the east bank of the Susquehanna River in Pittston, Pennsylvania.

error of law or a misapprehension of the facts, Alcan's motion will be denied.

In its motion for reconsideration and at oral argument Alcan argued that I overlooked "record evidence" which demonstrated that the response action was not directed at Alcan's emulsion. (Dkt. Entry 163 at 2.) It is undisputed, however, that Alcan's emulsion was part of the commingled oily waste that polluted the Susquehanna River. Alcan failed to present evidence showing that its emulsion was not part of the oily scum that was skimmed from the Susquehanna River. Because it is undisputed that the entire "hazardous soup" that discharged into the Susquehanna River was remediated, and Alcan's emulsion was one of the ingredients of this oily stew, it is incorrect to say that the response action was not directed at the emulsion.[2]

Alcan alleges that its emulsion did not float on the surface and, in effect, "passed under" the "Harvard booms" which were used to skim the oily waste from the Susquehanna River. (Dkt. Entry 163 at 7.) This argument considers Alcan's waste emulsion in isolation, and not as a constituent of the mass of oily waste that flowed into the Susquehanna River.[3] Alcan

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[2]Alcan's "dioxin-in-milk" argument misses the point. Alcan's emulsion alone may have necessitated response action, but the milk alone may not. It thus does not follow that the generator of milk contaminated by some other party's dioxin would bear some liability. Because Alcan's discharge of emulsion into a river may warrant some clean-up action and its hazardous constituents bring it within CERCLA's ambit, it is subject to liability even if the response action did not specifically target the hazardous constituents of its waste.

[3]For example, David. J. Lagoe, quoted in Alcan's motion, considered the Alcan emulsion in isolation and did not consider the outcome of it mixing with other substances. Dkt. Entry 133, Exh. 2 at 75.

did not present evidence that its emulsion was not part of the waste removed from the Susquehanna River. As the United States observes, "Alcan's argument ignores the directive to demonstrate what happens when Alcan's waste is mixed with other wastes at the sites." (Dkt. Entry 164 at 5.)

In arguing that its emulsion is not a hazardous substance subject to remediation, Alcan infers that because the substance is biodegradable, it is benign.[4] Alcan's assertion begs the question of why Alcan paid a waste hauler to remove the emulsion and why the waste hauler surreptitiously dumped the emulsion into a mine borehole. Clearly, the emulsion could not be discharged into a river. The emulsion is a pollutant. As our Court of Appeals held, the fact that this pollutant contains some hazardous substances, even below ambient levels, brings it within CERCLA's broad reach. The presence of this pollutant in the oily stew that was remediated subjected Alcan to joint and several liability, unless Alcan presented evidence showing that its pollutant did not contribute to the release and resultant response costs. Alcan's failure to address the issue of the interaction of its pollutant with other pollutants thus warranted imposition of joint and several liability.[5]

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[4]As evidence of the emulsion's biodegradability Alcan points to David J. Lagoe's affidavit from *United States v. Alcan Aluminum Corp.*, 990 F.2d 771 (2nd Cir. 1993), filed January 4, 1991. In that affidavit Lagoe stated that the used emulsion from another facility is used to irrigate lawns in Kentucky pursuant to a government permit. (Dkt. Entry 93, Alcan's Supplemental Brief in Opposition to Plaintiff's Summary Judgment Motion, Exh. "D," at ¶ 13.)

[5]Alcan was essentially invited to present evidence that would have permitted apportionment of liability on a volumetric basis. The record suggests that if liability was

The premise for Alcan's liability is that its emulsion is classified as hazardous under CERCLA. Alcan's perceived unfairness in having to contribute to the cost of remediating the Site at which thousands of gallons of its emulsion was dumped must therefore be remedied by the creators of this liability scheme, Congress.[6]

Alcan was charged with proving that "its waste oil emulsion did not or could not, *when mixed with other hazardous wastes*, contribute to the release and resultant response costs." *Alcan*, 964 F.2d at 270 (emphasis in original). Alcan has not met its burden of proof.

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divided on this basis, Alcan's share of the response cost would be approximately $65,000 (5% of $1,302,290.18), as opposed to $473,790.10 (the difference between the government's response cost of $1,302,290.18 and the amount paid by the settling defendants). Alcan, however, has adamantly refused to pursue this approach, contending that it should bear no liability for the discharge of thousands of gallons of its waste into the Susquehanna River.

[6]Alcan's strident rhetoric and its repeated assertion that its emulsion is like milk ignore the fact that Congress conditioned liability on the release of hazardous substances. Alcan's emulsion contains hazardous substances and was released into the environment at the Site. Under the statutory scheme, a release of a hazardous substance may lead to liability, even joint and several liability, for a polluter whose contaminants do not have chronic adverse consequences for the environment. Common law principles of apportionment of liability can ameliorate the consequences and counter the "strong-arm" settlement tactics that joint and several liability may permit, but Alcan has eschewed that opportunity to minimize its liability.

NOW, THEREFORE, IT IS NOW HEREBY ORDERED THAT Alcan's Motion for Reconsideration (Dkt. Entry 163) is DENIED.

/s/ Thomas I. Vanaskie
U.S. District Judge